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A

Loh Shiiun Hing v Kurnia Insurans (M) Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–296 OF 2008
ABU SAMAH, MOHD HISHAMUDIN AND AZIAH ALI JJCA
19 FEBRUARY 2014

C

Insurance — Marine insurance — 'Voyage' and 'time' policies distinguished — Insurer repudiated liability to pay for sinking of barge on ground policy issued 'voyage' policy impliedly warranting vessel was seaworthy — Whether policy, in fact, 'time' policy where such warranty not implied — Whether burden to prove unseaworthiness of vessel fell on insurer — Whether s 39 of the Maritime Insurance Act 1906 did not mandatorily require prior ship survey to be done before policy could be issued — Whether policy issued to insured also did not require prior survey of vessel — Whether insured made full disclosures in proposal form for policy

D

English Maritime Insurance Act 1906 ('MIA') The respondent had insured the appellant's barge, including machinery and boilers, for RM450,000 for a period of 12 months from 25 January 2002. A day after the policy took effect the barge sank and was lost in rough seas whilst carrying timber logs. The appellant claimed payment of the insured amount but it was rejected by the respondent on the ground, inter alia, that the barge had not been surveyed by a ship surveyor before the policy was issued as was common maritime insurance practice. It was also alleged that the appellant had misrepresented to the respondent material information concerning the barge, entitling the latter to avoid the policy. The High Court dismissed the appellant's claim holding that (a) he had failed to adduce evidence to show the nature and full terms of the policy (b) the policy in question was a 'voyage' policy, which, under s 39(1) of the English Maritime Insurance Act 1906 ('MIA'), carried an implied warranty that the vessel was seaworthy but the appellant had failed to discharge his burden of proving that the barge was seaworthy (c) the appellant had failed to disclose all information which had a bearing to the risk insured, and (d) the barge had not been surveyed to determine its seaworthiness before the policy was issued. The appellant's instant appeal against the High Court's decision largely turned on whether the policy in question was a 'voyage', or a 'time', policy. Under s 39 of the MIA, unlike in a 'voyage' policy, there was no implied warranty in a 'time' policy that a ship was seaworthy at any stage of the adventure.

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Held, allowing the appeal, setting aside the decision of the High Court and granting the appellant's claim against the respondent:

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(1) The policy in question was clearly a 'time' policy within the meaning of s 25 of the MIA. It covered a period of 12 months from 25 January 2002 to 24 January 2003. There was nothing in the policy to state the contract was to insure the vessel 'at and from' or 'from one place to another or others'. It simply referred to policy cover for a fixed period. Being a 'time' policy, there was no implied warranty that the vessel was seaworthy at any stage of the adventure. There was no basis, in fact and in law, to support the High Court's conclusion that the policy was a 'voyage' policy (see para 26).

(2) Section 39 of the MIA did not make it mandatory that a prior ship survey had to be done before any marine insurance policy could be issued. The policy issued to the appellant also did not include an express term that the vessel should have been subjected to prior survey. The appellant had disclosed fully all information in answer to all questions in the proposal form. He had disclosed that the last survey of the vessel was done on 13 March 2001 (see paras 22 and 26).

(3) The evidence did not show that the appellant had knowledge that the vessel was unseaworthy. Unseaworthiness was a question of fact, the burden of proof of which was on the insurer. The respondent did not establish that the vessel was unseaworthy at any stage of the adventure. On the contrary, the respondent's own 'Final Report', prepared by Mclarens Toplis, disclosed that the vessel sank not because it was unseaworthy but because of stormy weather and high seas. The report concluded that there was no breach of warranties by the appellant and recommended that the respondent settle the claim as its liability 'appeared to be apparent' (see paras 28–30).

(4) The High Court misdirected itself in holding that the appellant had not adduced any evidence to show the nature and full terms of the policy. The proposal form and the marine insurance policy between the parties were before the court and the respondent did not, in its defence, deny issuing the policy (see para 13).

[Bahasa Malaysia summary

Responden telah menginsuranskan baj perayu, termasuk jentera dan dandang, sebanyak RM450,000 untuk tempoh 12 bulan bermula dari 25 Januari 2002. Sehari selepas polisi berkuat kuasa baj tersebut telah karam dan hilang di tengah laut laut bergelora semasa membawa kayu balak. Perayu menuntut bayaran amaun yang diinsuranskan tetapi telah ditolak oleh responden atas alasan, antara lain, baj itu tidak diperiksa oleh juruukur kapal sebelum polisi itu dikeluarkan seperti amalan biasa insurans maritim. Adalah turut didakwa bahawa perayu telah salah nyata kepada responden maklumat material berkenaan baj itu, yang membolehkan responden untuk mengelak daripada polisi tersebut. Mahkamah Tinggi telah menolak tuntutan perayu

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memutuskan bahawa (a) dia telah gagal untuk mengemukakan keterangan untuk menunjukkan jenis dan keseluruhan terma-terma polisi (b) polisi yang dipersoalkan adalah polisi 'voyage', yang mana, di bawah s 39(1) membawa waranti tersirat bahawa vesel adalah layak berlayar tetapi perayu gagal untuk melepaskan bebannya untuk membuktikan bahawa baj tersebut layak belayar (c) perayu gagal untuk mendedahkan kesemua maklumat yang mempunyai kaitan dengan risiko yang diinsuranskan, dan (d) baj tersebut tidak diperiksa untuk menentukan ia layak belayar sebelum polisi dikeluarkan. Rayuan perayu terhadap keputusan Mahkamah Tinggi sebahagian besarnya adalah sama ada polisi yang dipersoalkan adalah polisi 'voyage', atau 'time'. Di bawah s 39 MIA, tidak seperti polisi 'voyage', tiada waranti tersirat dalam polisi 'time' bahawa kapal layak belayar pada apa-apa peringkat pengembaraan.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan tuntutan perayu terhadap responden:

(1) Polisi yang dipersoalkan adalah jelas polisi 'time' yang terangkum di bawah maksud s 25 MIA. Ia melindungi tempoh 12 bulan bermula 25 Januari 2002 hingga 24 Januari 2003. Tiada apa di dalam polisi yang menyatakan kontrak tersebut adalah untuk menginsuranskan vesel 'at and from' atau 'from one place to anothers or others'. Ia merujuk semata-mata kepada perlindungan polisi untuk tempoh yang ditetapkan. Menjadi polisi 'time', tiada waranti tersirat bahawa vesel layak belayar pada mana-mana peringkat pengembaraan. Tiada dasar, dari segi fakta dan undang-undang, untuk menyokong kesimpulan Mahkamah Tinggi bahawa polisi tersebut adalah polisi 'voyage' (lihat perenggan 26).

(2) Seksyen 39 MIA tidak mewajibkan bahawa pemeriksaan kapal hendaklah dilakukan terlebih dahulu sebelum apa-apa polisi insurans marin boleh dikeluarkan. Polisi yang dikeluarkan kepada perayu juga tidak termasuk terma nyata bahawa vesel hendaklah menjalani pemeriksaan terlebih dahulu. Perayu telah mendedahkan kesemua maklumat dalam jawapan kepada semua soalan dalam borang cadangan. Dia telah mendedahkan bahawa pemeriksaan vesel terakhir telah dilakukan pada 13 Mac 2001 (lihat perenggan 22 & 26).

(3) Keterangan tidak menunjukkan perayu mempunyai pengetahuan bahawa vesel tidak layak belayar. Tidak layak belayar adalah persoalan fakta, yang mana beban pembuktian adalah atas penginsurans. Responden tidak menyatakan bahawa vesel tidak layak belayar pada sebarang peringkat pengembaraan. Sebaliknya, 'Final Report' kepunyaan responden, yang disediakan oleh McLarens Toplis, mendedahkan bahawa vesel tersebut karam bukan kerana ia tidak layak belayar tetapi kerana keadaan laut bergelora dan laut lepas. Laporan itu memutuskan bahawa tiada pelanggaran waranti oleh perayu dan menyarankan responden untuk menyelesaikan tuntutan kerana liabilitinya 'appeared to

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be apparent' (lihat perenggan 28–30).

(4) Mahkamah Tinggi telah tersalah arah dalam memutuskan bahawa perayu tidak mengemukakan apa-apa keterangan untuk menunjukkan jenis dan keseluruhan terma-terma polisi tersebut. Borang cadangan dan polisi insurans marin antara pihak-pihak telah dikemukakan di hadapan mahkamah dan responden tidak, dalam pembelaannya, menafikan mengeluarkan polisi tersebut (lihat perenggan 13).]

Notes

For cases on 'voyage' and 'time' policies distinguished, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 292–293.

Cases referred to

Compania Naviera Vascongada v British and Foreign Marine Insurance Co Ltd [1936] 54 Ll LR 35 (refd)

Campania Maritim San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes [1976] 2 Lloyd's Rep 171, CA (refd)

Malayan Motor & General Underwriters (Pte) Ltd v MH Almojil [1982] 2 MLJ 2; [1982] CLJ 906 (Rep), CA (refd)

Provincial Insurance Co Ltd v Yeo Chee Swee [1984] 2 MLJ 60, FC (refd)

Robertson and another v French (1803) 4 East 130, KBD (refd)

Thomas v Tyne and Wear Steamship Freight Insurance Association [1917] 1 KB 938, KBD (refd)

Legislation referred to

Civil Law Act 1956 s 5(2)

Maritime Insurance Act 1906 [UK] ss 25, 39, 39(1), (5)

Appeal from: Civil Suit No 22–36 of 2004 (High Court, Sibu)

Tony Ling (Nawi, Wong & Partners Associates) for the appellant.
Arther Lee (Arthur Lee, Lin & Co Associates) for the respondent.

Abu Samah JCA (delivering judgment of the court):

[1] The appellant's claim against the respondent in the High Court below was for a sum of RM450,000 based on marine insurance policy issued by the latter, being the total sum insured for the appellant's barge and machinery and boilers, which sank in rough waters near Kuala Igau, Sarawak while carrying timber logs. The appellant also claimed interest at 6%pa from 3 June 2002 until full settlement and costs.

[2] The unfortunate incident was unexpected nor was it contemplated. The appellant took out the insurance from the insurer ('the respondent') on

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25 January 2002 to insure his barge, 'Eng Tou 68' for a period of 12 months commencing from 25 January 2002 to 24 January 2003. The subject matter of the policy is described in the Schedule as follows:

Marine Hull Schedule

On Hull and Equipment ...	RM350,000
On Machinery and Boilers ...	*RM100,000*
	RM450,000

[3] On the night of 26 January 2002 at about 10.30pm the barge sank in rough seas while carrying logs for Kong Thai (1963) Sdn Bhd and was totally lost. On 7 May 2002 the appellant made a claim in writing against the respondent for the insured sum of RM450,000. The respondent rejected the claim on the grounds of, inter alia, misrepresentation of the identity of the barge. On 15 October 2004 the appellant commenced an action against the respondent in the High Gourt at Sibu Sarawak after all attempts to settle the claim out of court were unsuccessful.

[4] The respondent in its statement of defence repudiated liability on the grounds of false representation, citing among others, the following particulars:

(a) the respondent agreed to issue the cover note on the basis of the appellant's undertaking that a ship survey would be undertaken by McLaren Saksama (M) Sdn Bhd as is required by maritime insurance practice and a copy of the said survey would be forwarded to the respondent;

(b) unknown to respondent the appellant brought the ship surveyor to view two other vessels instead of the vessel in question;

(c) it was not revealed to the respondent that the vessel surveyed was not the vessel in question for which the coverage was sought and which was a condition precedent for the issue of the cover note; and

(d) the insured vessel was not in Sibu port at the time of viewing. It had already set sail for its port of loading or had been lost at the time insurance cover was sought.

[5] The issues to be tried as stated by the learned judicial commissioner ('JC') were finally narrowed down to the following:

(a) whether a barge to be insured must be surveyed ie whether it was compulsory for the barge to be surveyed; and

(b) if the barge needs to be surveyed whether the cover note issued by the defendant is nevertheless valid.

[6] The High Court dismissed the appellant's claim on the ground that the

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appellant had not adduced any evidence to show the nature of the policy and the full terms of the policy. The learned JC was of the view that the ship was insured to cover voyage in which seaworthiness is a condition precedent before the barge could be insured in view of s 39(1) of the Maritime Insurance Act 1906 ('MIA'). Further the appellant did not disclose all information which has bearing to the risk.

[7] For convenience, we reproduce the reasons given by the learned JC in dismissing the appellant's claims:

> My reasons are as follows:
>
> (i) The Plaintiffs have not adduced any evidence to show the nature of the policy, (ii) and full terms of the policy. Further, it is beyond doubt that the ship was insured to cover voyage and the claim is in consequence of rough sea which is an admitted fact. In consequence, seaworthiness is a condition precedent before the barge can be insured, as per of s 39(1) MIA 1906 or at least there is a duty of disclosure and the plaintiff had failed to do so, (iii) Further, there is a duty to disclose all information, which has bearing to the risk. In this case it was not done.
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> In *Joel v Law Union & Crown Insurance Co* [1908] 2 KB 863 Fletcher Moulton LJ opined:
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> > The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognised it to be so. But the question always is, was the knowledge you possessed such that you ought to have disclosed it?
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> [See in *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485]
>
> (v) In addition, s 18 of the MIA 1906 states:
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> (1) Subject to the provisions of this section the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
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> (2) Every circumstance is material, which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
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> (3) In the absence of inquiry the following circumstances need not be disclosed, namely:
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> (a) Any circumstance which diminishes the risk;
>
> (b) Any circumstance which is known or presumed to be known to the

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insurer. The insurer is presumed to know matters of common notoriety or knowledge and matters, which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term 'circumstance' includes any communication made to, or information received by the assured.

(vi) It is now well established that it is the duty of the insured to disclose information, which a prudent insurer would regard as material. In this case, there was no survey done and it was not established whether the ship was seaworthy. For the plaintiff to argue that it can insure a barge when it is not seaworthy runs foul of marine insurance law.

[8] The learned JC was also of the view that the facts before him were similar to the facts in *Malayan Motor & General Underwriters (Pte) Ltd v MH Almojil* [1982] 2 MLJ 2; [1982] CLJ 906 (Rep) where the Court of Appeal (Singapore) held that the policy in that case was not a time policy simpliciter but was a 'mixed policy'.

[9] In that the case, the respondent bought the vessel from Singapore Shipping Industries (Private) Ltd ('SSI'). The respondent wanted to use it to ferry 30 to 40 persons to and from platforms at sea, as he was involved in the business of construction of oil refineries and offshore installations in Saudi Arabia. SSI agreed to arrange for the delivery of the vessel to the respondent from Singapore to Damman and take out a hull policy on behalf of the respondent for an insured sum of $1.25m which covered a period between 21 April 1975 and 20 April 1976. The policy contained the following warranty:

(a) trading within Persian Gulf but including one delivery from Singapore to Persian Gulf on its own steam sailing on or about 21 April 1975;

(b) ... ;

(c) subject to satisfactory condition of survey by approved surveyors.

[10] SSI delivered the vessel to the respondent on or about 23 May 1975. The vessel sailed from Singapore to Damman on 30 May 1975. But on reaching the Indian Ocean, it encountered stormy winds and high seas which caused, among others, the engines to malfunction and the radar inoperative. It was forced to stop in Colombo for repairs which took more than two months.

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After it left Colombo for Damman the weather worsened and the vessel eventually capsized. It was a total loss. The appellant, as underwriter, denied liability.

[11] The major issues in that case turned on the construction of the policy. The first issue in that appeal was whether the policy in question was a time policy or a mixed policy such that the respondent had not warranted that the vessel would be seaworthy on sailing from Singapore. If it is a time policy, there is no question of the respondent having warranted that the vessel would be seaworthy on sailing and accordingly no breach of the policy by the respondent. The respondent contended that it was a time policy as the contract in terms of the policy was for a *definite period of time* and not *between two termini*. The Singapore Court of Appeal held that it was not a time policy simpliciter but a 'mixed policy' affording a cover of 12 months and attaching as from and on the voyage from Singapore to the Persian Gulf. The court in that case found that the vessel was not seaworthy and that the respondent was in breach of the warranty of seaworthiness. The respondent did not comply with warranty (c) which was a condition precedent to the risk attaching.

[12] Learned counsel for the appellant submitted that the learned JC erred in holding that the appellant did not adduce evidence on the nature and the terms of the policy and in relying on the Singapore case when the facts in that case and the facts in the instant appeal were manifestly different.

[13] We agreed with the contention of learned counsel for the appellant that the learned JC had misdirected himself in holding that the appellant had not adduced any evidence to show the nature of the policy and the full terms of the policy. The proposal form and the marine insurance policy dated 25 January 2002 between the appellant and the respondent were before the court. The respondent did not, in its defence deny issuing the policy. The terms of the policy are contained in the policy itself.

[14] The main issue before us was on the nature or the type of policy. The High Court held that it was a voyage policy. The appellant contended that it was a time policy. The nature of the policy in question has a direct bearing on the outcome of the appeal before us.

[15] It is not disputed by the parties that by virtue of s 5(2) of the Civil Law Act 1956 , the law applicable is the English Maritime Insurance Act 1906 ('MIA'). The MIA is an Act which codifies the common law relating to marine insurance. (see *Halsbury's Laws of England*, (5th Ed) para 238).

[16] Thus the nature of the policy must be determined by looking at the terms of the policy itself and in general by reference to the merchant law as

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codified in the MIA. This is essentially a matter of construction of the policy and the relevant provisions in the MIA.

[17] A marine policy is to be construed like any other contract. This is done by looking at the terms used in the policy, which terms are themselves to be understood in their primary, natural, ordinary and popular sense. In *Robertson and another v French* (1803) 4 East 130, Lord Ellenborough CJ said:

> In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy insurance, viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.

[18] The Federal Court in *Provincial Insurance Co Ltd v Yeo Chee Swee* [1984] 2 MLJ 60 expressed the same view:

> A policy of insurance is basically subject to the same rules of construction as any other written contract. The words used in it must be given their plain, ordinary meaning but in the context of the policy looked as a whole and subject to any special definition contained in the policy — *Jason v British Trades' Insurance Co Ltd* [1969] 1 Lloyd's Rep 281, at p 290.

A similar approach was taken by the Singapore Court of Appeal in *Malayan Motor & General Underwriters Pte Ltd v MH Almojil*.

[19] The terms 'time policy' and 'Voyage policy' are defined in s 25 of the MIA:

> 25 Where the contract is to insure the subject-matter 'at and from', or from one place to another or others, the policy is called a 'voyage policy', and where the contract is to insure the subject-matter for a define period of time the policy is called a 'time policy' . A contract for both voyage and time may be included in the same policy.

[20] The distinction between time and voyage policies is significant because the risk under the two types of policy commences and terminates at different times; the assured under a voyage policy is duty bound to commence and maintain the voyage without delay, deviation or change of voyage and there is

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no implied warranty of seaworthiness in a time policy (see *Colinvaux's Law of Insurance*, (7th Ed) p 488). In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured (s 39(1) of the MIA).

[21] The learned JC held that the policy was a voyage policy and thus, seaworthiness was a condition precedent before the barge could be insured in view of s 39(1) of the MIA. It was the respondent's contention all along that the barge must first be surveyed to determine its seaworthiness which is a condition precedent before the issuance of the cover note. This was in fact not done as the ship surveyor was shown different vessels and not the vessel in question, namely 'Eng Tou 68', which was not in the dock at the time of inspection. The burden was on the appellant to prove that the barge was seaworthy at the start of the voyage.

[22] We note that the respondent's standard proposal form includes a column requiring the appellant to state the date of last survey and the name of the ship surveyor. This was duly disclosed by the appellant. The policy issued to the appellant did not however include an express term that the ship must be subject to prior survey.

[23] The provision relating to seaworthiness can be found in s 39 of the MIA. Section 39 states:

> 39 Warranty of seaworthiness of ship
>
> (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
>
> (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
>
> (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
>
> (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
>
> (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

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[24] It is clear from s 39 above that the implied warranty of seaworthiness depends on the type of policy issued. In a voyage policy, there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured (s 39(1)). In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. Section 39 does not make it mandatory that a ship survey must be made immediately before every marine insurance policy is issued. This is self evident as there is already an implied warranty in s 39(1) of the MIA that in a voyage policy the ship shall be seaworthy.

[25] An insurer may insist on a ship survey as a condition precedent in a time policy as there is no implied warranty in law that the ship shall be seaworthy. But that was not the position taken by the respondent. The respondent contended that the policy was a voyage policy and a survey must be done before the inssuance of the cover note or policy.

[26] We have read and reread the policy in question. The policy covers a period of '12 months from 0.01am 25 January 2002 to 24 January 2003 Malaysia time'. As referred to earlier the subject matter of the policy is:

(a) Hull and equipment for RM350,000; and

(b) Machinery and Boilers for RM100,000.

The total sum insured is RM450,000. There is nothing in the policy stating that the contract is to insure the said subject matter 'at and fro' or from one place to another or others. It simply refers to policy cover for a fixed period. In our judgment the policy is clearly a 'time policy' within the meaning of s 25 of the MIA. Being a time policy there is no implied warranty that the vessel shall be seaworthy at any state of the adventure. It is neither a 'Voyage policy' nor a 'mixed policy' refered to in *Malayan Motor & General Underwriters Pte Ltd*. The facts in that case were manifestly different from the facts before us. The terms of the policy were also different. In that case, it was a term of the warranty that the ship was subject to a satisfactory condition of survey. There is no such condition precedent in the case before us. Had the High Court scrutinised the terms of the policy in question, its decision could have been different. There is absolutely no basis, in facts and in law, to support the conclusion that the policy was a voyage policy. The appellant had disclosed fully all information in answers to all questions in the proposal form. The last survey was done on 13 March 2001. Section 39 of the MIA does not make it mandatory that a prior survey must be done before any policy can be issued.

[27] It was held in *Thomas v Tyne and Wear Steamship Freight Insurance*

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Association [1917] 1 KB 938 that where a ship was sent to sea in a state of unseaworthiness in more than one respect, and the assured was privy to some, but not all, of the defects, the insurer would be liable unless the assured was privy to the particular defect which caused the loss. In *Compania Naviera Vascongada v British and Foreign Marine Insurance Co Ltd* [1936] 54 Ll L 35 at p 58 Branson J held that mere omission to take precautions against the ship being unseaworthy did not make the owner privy to any unseaworthiness which that precaution might have disclosed.

[28] The meaning of the words, 'with the privity of the assured' in s 39(5) of the MIA had been explained in the *The Eurysthenes, Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1976] 2 Lloyd's Rep 171, CA. Lord Denning at p 179 said:

> 'Privity' did not mean that there was any wilful misconduct by him, only that he knew of the act beforehand and concurred in it being done. Moreover, 'Privity' did not mean that he himself personally did the act, but only that someone else did it and that he knowingly concurred in it. Hence, in the later Merchant Shipping Acts, the owner was entitled to limit his liability if the act was done 'without his actual fault or privity'. Without his 'actual fault' meant without any actual fault by the owner personally. Without his 'privity' meant without his knowledge or concurrence.
>
> Such is, I think, the meaning we should attach to the word 'privity' in s 39(5) . If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he knew and in which he concurred.
>
> To disentitle the ship owner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry — so that he should not know it for certain - then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.

The evidence before the court did not show that the appellant had knowledge that the vessel was unseaworthiness.

[29] Unseaworthiness is a question of fact, the burden of proof of which is on the insurer (see para 265, *Halsbury's Laws of England*, (5th Ed) The respondent had not established that the ship was not seaworthy at any stage of the adventure. On the contrary the respondent's own report, titled 'Final

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Report' demolished any suggestion that the ship sank because it was not seaworthy. A

[30] In fact, the issue of seaworthiness, raised as a defence by the respondent did not hold water. The vessel sank not because it was not seaworthiness but because of stormy weather and high seas. This was disclosed in the respondent's own 'Final Report' dated 26 January 2002 prepared by McLarens Toplis. The report concluded that 'an incident as reported could have occurred', it would not be economical to salvage and repair the vessel and that there was no breach of warranties by the appellant. The report recommended that the respondent settle the claim and advised the respondent that, 'insurers' liability appears to be apparent'. B C

[31] For the reasons as aforesaid, we allowed the appeal with costs, set aside the judgment of the High Court and ordered that judgment be entered as in prayers (a), (b) and (c) of statement of claim. D

Appeal allowed, decision of the High Court set aside and appellant's claim against respondent granted.

Reported by Ashok Kumar E

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